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IN THE

Supreme Court of the United States

October Term, 1965
No. 539

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Bank of America National Trust and Savings Association, hereinafter referred to as the Bank, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on May 13, 1965.

Opinions Below.

The opinion of the Circuit Court of Appeals, on the first appeal (Appendix B, *infra,* p. 5), is reported in 317 F. 2d 859. The opinion of the District Court, after trial and upon judgment for the Government (Appendix B, *infra,* p. 9), is reported in 229 F. Supp. 906. The opinion of the Circuit Court of Appeals on the second appeal (Appendix B, *infra,* p. 15), is reported in 345 F. 2d 624.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 13, 1965. By order of Mr. Justice Douglas, entered August 8, 1965, time for filing petition for certiorari was extended to and including September 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Question Presented.

Whether the courts below, in an action by the United States under 26 U.S.C. §6332(b) against a bank for failure, on notice of levy and demand, to surrender a deposit balance allegedly the property of a delinquent taxpayer, erred in ignoring and failing to follow the California cross-demand "compensation" statute (derived from the civil law) which, as a substantive law of property, makes existing cross-demands of the bank operate, prior to levy or demand and at the very time of deposit, automatically to pay, extinguish, and discharge the deposit obligation to the taxpayer.

Statutes Involved.

The California Code of Civil Procedure, section 440, provides:

> "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

The third-party provision of the seizure subchapter of the Internal Revenue Code (26 U.S.C. § 6332) in pertinent part provides:

> "Surrender of Property Subject to Levy
>
> "(a) Requirement
>
> "Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate. . . .
>
> "(b) Penalty for violation
>
> "Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made. . . ."

Other pertinent provisions of the Internal Revenue Code, 1954 (Title 26, U.S.C., secs. 6321, 6322, 6323, 6331) are printed in Appendix A, *infra*, pp. 1-4.

Statement.

On April 11, 1961, the United States filed its complaint against the petitioner Bank under 26 U.S.C. §6332(b) to recover the sum of $6,658.38 for failure to surrender, upon notice of levy served August 27,

1959, and final demand September 25, 1959, funds in that amount allegedly owned by a delinquent taxpayer, one J. B. Edmondson, and on deposit in the Bank at the time of the levy [R. 1-6]. The Bank's answer denied, *inter alia*, that funds so owned by Edmondson were on deposit in the Bank at time of levy and final demand [R. 7-8]. Both parties moved for summary judgment upon stipulation of facts and the trial court entered judgment for the United States. The Court of Appeals held the stipulated facts inadequate, vacated the judgment and remanded for further proceedings (App'x B, *infra*, p. 5); *Bank of America National Trust & Savings Association v. United States*, 317 F. 2d 859 (9th Cir. 1963). Upon trial of the case [R. 33-46] after it was sent back to the trial court an opinion was filed ordering judgment for the United States [R. 21-27] (App'x B, *infra*, p. 9); *United States v. Bank of America National Trust and Savings Association*, 229 F. Supp. 906. The Court of Appeals affirmed (App'x B, *infra*, p. 15; *Bank of America v. United States*, 345 F. 2d 624).

No question of fact is involved.

Assessments and demands on taxpayer.—Withholding and F.I.C.A. taxes for the first three quarters of 1955 were assessed against the taxpayer, J. B. Edmondson, who did business under a number of fictitious firm names [R. 11]. Notices and demands for payment were timely given to, and made on, the taxpayer; notices of liens for the assessed taxes were also filed in

the recorder's office for Orange County, California, not later than January 28, 1958 [R. 9-10].[1]

Bank's lack of notice or knowledge.—Prior to August 27, 1959, no demand for payment, or actual notice, of the tax liability of the taxpayer, Edmondson, or of the liens against his property, was made or given to the Bank and, until that date, it had no actual knowledge thereof [R. 11].

Notice of levy and demand served on bank.—On August 27, 1959, the District Director served upon the Bank a notice of levy upon all property or rights to property, monies, credits and bank deposits in its possession and belonging to the taxpayer; the notice demanded payment of the amount of $12,219.09 from the amount then owing from the bank to the taxpayer [R. 10]. At the time of service of such notice of levy, and again, on service of Final Demand, September 25, 1959, the Bank refused to pay over any amount [R. 11].

Bank's records as to deposits by taxpayer.—On August 27, 1959, the books of the Bank still showed in the several commercial checking accounts and one savings account of the taxpayer credits totalling $6,658.31 [R. 11, 24].[2]

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[1]The relevant dates as to taxes for each quarter are:

1955	Date of Assessment	Notice to, and demand on taxpayer	Filing of notice of lien in Orange County
1st qtr.	July 8, 1955	July 13, 1955	Oct. 19, 1955
2nd qtr.	Sept. 20, 1955	Oct. 28, 1955	Jan. 28, 1958
3rd qtr.	Oct. 21, 1955	Nov. 8, 1955	Jan. 28, 1958

[2]This total was made up of remaining balances of checks endorsed and negotiated to the Bank for deposit by the taxpayer as follows: $560.66 deposited July 31, 1959; $378.71 deposited August 21, 1959; $160.56 deposited August 26, 1959; $5,318.38 deposited August 26, 1959; plus the sum of $240.00 in a savings account in the name of the taxpayer.

Taxpayer's obligations to the Bank.—On August 27, 1959, the day of levy and demand on the Bank, the taxpayer was indebted to the bank in the amount of $11,570.49 [R. 13, 22]. This total owing by the taxpayer to the Bank included:

A.	Five automobile conditional sales contracts, all executed by the taxpayer as purchaser, and by the vendors assigned to the Bank not later than March, 1959, total due on August 27, 1959[3] [R. 13-16]	$ 9,161.25
B.	Promissory note in amount of $1,200.00 payable June 19, 1959. Unpaid balance with interest, overdue August 27, 1959 [R. 16]	1,230.10
C.	Promissory note dated May 28, 1959, in amount of $1,284.00 payable in 12 monthly installments. Unpaid balance with interest on August 27, 1959 [R. 16-17][3]	1,179.14
		$11,570.49

Post-levy entries by Bank.—The day after receipt of notice of levy, the Bank on its books charged the deposit accounts of the taxpayer with the full amounts of their credit balances and credited the total of $6,658.31 on the obligations of the taxpayer to the Bank [R. 17].

Determinations below.—The opinion of the trial court, after quoting the California Code of Civil Pro-

[3]Defaulted installments on the conditional sales contracts totalled $743.24 and on the note (Item C) $107.00. The maturity date of the promissory note (Item B) had long since passed. Each document contained provision for acceleration of the whole liability "at option of" seller or holder [R. 13-17].

cedure, sec. 440 [R. 24], but without consideration of the decisions of the state courts construing it, holds the statute to create merely a statutory right of setoff [R. 25] that had not been exercised by the Bank at the time of levy [R. 27]. It concluded that the case was controlled by *Bank of Nevada v. United States,* 251 F. 2d 820 (9th Cir. 1957) *cert. denied* 356 U.S. 938 (1958).

In the Court of Appeals, petitioner urged that the automatic operation of the California statute left the Bank with no property of the taxpayer at time the deposits were made or any time thereafter [R. 31]. The opinion of the Court of Appeals (App'x B, *infra,* p. 16) concludes:

> "The bank seeks to distinguish this case upon the ground that in Bank of Nevada, supra, it was the levy itself which accelerated and rendered mature the obligation of the depositor to the bank, while here the obligation was mature at the time tht deposit was made and at all times thereafter. The language and rationale of the Bank of Nevada case do not permit of such a distinction. 251 F. 2d 820, 827."

Reasons for Granting the Writ.

1. *The decision of the court below conflicts with decisions of the California courts.*—The decisions of the California courts establish that under the controlling law of that state, at the time of service of the notice of levy on the bank the latter was under no obligation to the taxpayer on his deposits and the Bank held no property interest of the taxpayer that was subject to levy.

California Code of Civil Procedure, Sec. 440, provides:

> "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

This is no common set-off statute. It is almost unique in the United States, being derived from the civil law and traceable to the ancient Roman law of *compensatio*. It is entirely different from judicially administered set-off; it is an extra-judicial, non-volitional extinction of cross-demands. As construed and applied by the California courts the most outstanding feature of its operation is that, where cross-demands co-exist, to the extent that they are equal, they are—without agreement or even knowledge of the debtors, and at the time they first co-exist—automatically paid, discharged and extinguished. See Comment, *Automatic Extinction of Cross-Demands; Compensation from Rome to California,* 53 Calif. Law. Rev. 224, 225.

Though it appears in a Code of Civil Procedure it has long been recognized to create substantive rights. In *Iowa & C. Land Co. v. Temescal Water Co.,* 95 Fed. 320 (C.C. S.D. Calif. 1899) the court so stated and further held (p. 321):

> "The compensation for which the section provides takes place just as soon as the cross demands co-exist; the greater demand being credited with the smaller, and the latter entirely discharged."[4]

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[4]Statement in this opinion that both cross-demands must be liquidated was later overruled as mere dictum. *Sunrise Produce Co. v. Malovich,* 101 Cal. App. 2d 520, 225 P. 2d 973 (1950).

In *Jones v. Mortimer*, 28 Cal. 2d 627, 170 P. 2d 893 (1946), the court held that the automatic payment, under the statute, was available as a defense but that the claim itself was extinguished and the defense not barred by the statute of limitations. On an action commenced in 1933, plaintiff obtained judgment in 1940 for $1536 for services rendered a savings and loan association before it became insolvent. He was also a shareholder and in 1939 after its insolvency assessment of $400 was made against him but not pleaded prior to his judgment. In 1944, on his petition to enforce the judgment, the assessment was raised as a defense and he contended it was barred by the statute of limitations. The court held (pp. 632-633):

> "The cross-demands here, in the language of section 440, 'have existed between persons'—plaintiff and defendant. They existed between them at least at the time the assessment became due and the plaintiff's action on his claim was pending. They have existed under circumstances where if either brought an action thereon the other could have set up a counterclaim . . . the next step is that the demands are *compensated*. That can mean nothing more or less than that each of the claimants is *paid* to the extent that their claims are equal. To the extent that they are *paid*, how can the statute of limitations run on either of them? There is no outstanding claim on which the statute may run. It is discharged."[5]

[5]That the cross-demand takes effect as a payment, but does not continue as a claim against which the statute of limitations can run was recently recognized in the Southern District of New York, applying California law, as expounded in the *Jones* case. *King Bros. Productions, Inc. v. RKO Teleradio Pictures, Inc.*, 208 F. Supp. 271, 278 (1962).

In *Hauger v. Gates,* 42 Cal. 2d 752, 269 P. 2d 609 (1954) plaintiff, purchaser of a ranch, sued to set aside a foreclosure sale held when he defaulted on a deed of trust note. He contended there was no default because the seller had failed to deliver personal property to which plaintiff was entitled under the contract of sale. Demurrer was sustained. In reversing, the California Supreme Court ruled (p. 755)—

> ". . . plaintiffs were not in default at the time of the sale. Section 440 is explicit in stating that the co-existing cross-demands shall be 'compensated so far as they equal each other,' which necessarily means that each of the claimants is *paid* to the extent that their claims may be balanced in amount."

That the California statute regards the cross-demands as discharged—so far as equal—from the moment they first co-exist is also clear from *Pan Pacific Sash & Door Co. v. Greendale Park, Inc.,* 166 Cal. App. 2d 652, 333 P. 2d 802, 807. There the trial court had entered judgment for the difference between plaintiff's demand and defendant's counterclaim but interest for the full amount of plaintiff's demand, apparently on the theory that the counterclaim damages amount was not established until trial. The District Court of Appeal modified the judgment to allow interest only on the amount of the judgment from the stipulated date of commencement of interest. Citing the statute and *Jones v. Mortimer, supra,* it said (p. 807):

> "Thus to the extent that appellants had a right to offset against respondent's claim the amount of damage sustained by reason of the delivery of defective materials plaintiff's claim *was satisfied.*

Appellants *never* owed plaintiff $16,271.41 but only $12,535.96 for which the court awarded judgment." (Emphasis supplied).

2. *The decision below is in conflict with decisions of this Court.*—In failing or refusing to consider and give effect to the California court decisions construing the California Code of Civil Procedure, section 440, the decision of the Court below violates the rule laid down by this Court. That the issue of "no property rights" raised by the bank here must be first determined as a matter of state law was recognized by this Court in *United States v. Bess,* 357 U.S. 51, 55 (1958) and most clearly reiterated in *Aquilino v. United States,* 363 U.S. 509, 512-513 (1960):

> "The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had 'property' or 'rights to property' to which the tax lien could attach. In answering that question, both federal and state courts must look to state law, for it has long been the rule that 'in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute' ".

United States v. Durham Lumber Co., 363 U.S. 522, 526, reaffirms this important rule of decision.

Careful examination of the California law to determine what property rights of the taxpayer were subject to seizure in the hands of the Bank is equally important here as was such examination of the New York law in the *Aquilino* case.

3. *The judgments below are not entitled to the weight customarily given to lower court determinations of state law.*—The trial court quotes California Code of Civil Procedure, Sec. 440, upon which petitioner relies [R. 24] but calls it a mere "statutory right of set set-off under state law" [R. 25]. The opinion discloses no basis for this conclusion; neither does it reflect consideration of the pertinent state court decisions. It appears rather to give controlling weight to the ruling in *Bank of Nevada v. United States,* 251 F. 2d 820 (9th Cir. 1958), cert. denied 356 U.S. 938 (1958) [R. 25]—

> "that Federal tax liens and the provisions for their collection are strictly *Federal* and strictly *statutory* . . ."[6]

Neither can the judgment of the Court of Appeals reasonably be given the weight customarily attached by this Court to determinations of issues of state law made by a court skilled in the law of the particular state. A *per curiam* opinion (App'x B, *infra,* p. 15) can scarcely be said to demonstrate the requisite careful scrutiny of the state court decisions. Again, of the sitting judges, none was a California lawyer. *Cf. Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 534 (1949); *Estate of Spiegel v. Commissioner,* 335 U.S. 701, 707-708 (1948).

4. *The question of state law here involved is one of general and continuing importance.* In their lending operations, banks rely to a great extent upon the existence of compensating deposit balances of borrowing

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[6]The *Bank of Nevada* case was decided four months prior to the decision in *United States v. Bess,* 357 U.S. 51.

customers.[7] Banks lend upon the total assets of a borrower. The right to use compensating deposit balances is fundamental to sound credit practices, and has with the growth of the number and types of relationships between banks and borrowers, become increasingly important. The confusion resulting from the instant case in which the Ninth Circuit Court disregards the general rules pronounced by the Supreme Court on the meaning of "property and rights to property" under section 6323 of the Revenue Code of 1954 thus seriously impairs the credit functions of banks. It is therefore of utmost importance, and in the public interest, that this court resolve the conflicts and settle once and for all the question here involved.

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[7]Where a bank has no actual knowledge of the tax lien, its mere existence, whether or not recorded, imposes no duty on the bank not to make payments to the depositor from the deposits to which the lien has attached. *United States v. Eiland*, 223 F. 2d 118, 122 (4th Cir. 1955); *United States v. Sullivan*, 333 F. 2d 100, 114, n. 26 (3d Cir.) 1963; *United States v. Jacobs*, 155 F. Supp. 182, 190 (D. N.J. 1957); *United States v. Polan Industries, Inc.*, 196 F. Supp. 333 (S.D.W. Va. 1961); Rev. Rul. 56-48 (Cum. Bull. 1956-1, 561); Rev. Rul. 57-367 (Cum. Bull. 1957-2, 846). Plumb, *Federal Tax Collection and Lien Problems*, 13 Tax L. Rev. 247, 310.

[8]Even apart from the very special self-operating cross-demand provisions of section 440 of the California Code of Civil Procedure which were not involved in *Bank of Nevada, supra*, the rulings of the Ninth Circuit in *Bank of Nevada* and in the instant case are contrary to the decisions in other Circuits upholding the right of setoff in the face of a federal tax lien. *United States v. Bank of Shelby*, 68 F. 2d 538 (5th Cir. 1934); *United States v. Bank of United States*, 5 F. Supp. 942 (S.D.N.Y. 1934); *United States v. Long Island Drug Co.*, 115 F. 2d 983 (2d Cir. 1940); *Karno Smith Co. v. Maloney*, 112 F. 2d 690 (3rd Cir. 1940); *In re Halprin*, 280 F. 2d 407 (3rd Cir. 1960).

Conclusion.

It is submitted that the writ of certiorari should be granted in order to review the judgment of the court below or, in the alternative, to vacate and remand for more careful determination of the property rights of the petitioner and the taxpayer-depositor under applicable state law.

Respectfully submitted,

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APPENDIX A.

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that any accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1958 ed., Sec. 6321.)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1958 ed., Sec. 6322)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of lien without notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated,

whenever the State or Territory has by law designated an office within the State or territory for the filing of such notice; or

(2) *With clerk of district court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or territory for the filing of such notice; or

(3) *With clerk of district court for District of Columbia.*—In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) *Form of notice.*—If the notice filed pursuant to subsection (a)(1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a)(2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

(c) *Exception in case of securities.*—

(1) *Exception.*—Even though notice of a lien provided in section 6321 has been filed in the manner prescribed in subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

(2) *Definition of security.*—As used in this subsection, the term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

* * * * *

(26 U.S.C. 1958 ed., Sec. 6323)

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and

demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) *Seizure and sale of property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personel, tangible or intangible).

(c) *Successive seizures.*—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

(26 U.S.C. 1958 ed., Sec. 6331.)

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Bank of America National Trust & Savings Association, a National Banking Association, Appellant, vs. United States of America, Appellee. No. 18,142. May 24, 1963.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Chambers and Barnes, Circuit Judges, and Weigel, District Judge.

Chambers, Circuit Judge:

J. B. Edmondson in August, 1959, was a customer of the Bank of America at its West Orangethrope Road office in Fullerton, Orange County, California. Credit balances owed him by the bank on August 27, 1959, which, if there were no liens or set-offs, all would agree, amounted to $6,658.31.

Dating from 1955 to and including August 27, 1955, the government (the Internal Revenue Service) had balances due from the bank's customer Edmondson in excess of eight thousand dollars plus interest on three assessments made in 1955 for deficiencies in taxes for that year, either payroll withholding or F.I.C.A. (i.e. social security) payable in 1955 for the first three quarters thereof. The process of making the assessments, notifying the taxpayer Edmondson of the assessments and filing notices of lien in the recorder's office of Orange County, California, was all completed by January 28, 1958. Then on August 27, 1959, the date

herein mentioned at the outset, the District Director of Internal Revenue served a notice of levy upon the bank upon "all property or rights to property belonging to" Edmondson. Thereafter a final demand was made upon the bank. This was refused and on April 11, 1961, the United States sued the Bank of America for its book balances of $6,658.31 as of August 27, 1959, in favor of Edmondson.[1]

Very promptly and on August 28, 1959, the bank proceeded to protect itself by asserting a right of set-off against Edmondson. It made bookkeeping entries disposing of the customer's previous balance of $6,658.31 as follows:

1.	On "boat mortgage" indebtedness of Edmondson to the bank	$1,130.68
2.	On unsecured note	1,230.10
3.	On four of five conditional sales contracts assigned by Edmondson to the bank	4,297.53[2]
	Total	$6,658.31

The question of the case is whether the bank's self-help here was grounded on its legal right under applicable statutes, or did the federal levy get in between Edmondson's rights against the bank and the bank's rights against Edmondson.

After a "Pre-trial Stipulation of Facts and Statement of Contentions and Issues" was signed by the

[1]The sequence of how Edmondson acquired the balances in accounts for a total of $6,658.31 is set forth in an affidavit which accompanied the bank's motion for summary judgment.

[2]The asserted set-off did not fully satisfy the claimed balance on the fourth conditional sales contract and did not reach the fifth.

parties, each made a motion for summary judgment for the sum of $6,658.31. The trial court granted the government's motion. The bank appeals.

We have here a case which is obviously related to our case of Bank of Nevada v. United States, 251 F.2d 820, but as of now one has difficulty in determining whether it is a sister case or a case of third cousins twice removed. The trouble is in the stipulation and pre-trial order.

The exact nature of Edmondson's liability to the bank under the conditional sales contracts (apparently the seller's ends of the contracts were assigned to the bank) is not shown. The debt on the boat is described as "boat mortgage." The note is described as "unsecured note." Where reference is made to the conditional sales contracts two items of $132.33 and $52.14 called "unearned time price differential" are inserted. In simple English one can assume this pretty phrase means "unearned interest."

This court is not satisfied that the stipulation tells clearly how or when the balances became due. The bank thinks it is clear enough one way. The government does not agree and thinks it clear another way.[3]

The court is of the opinion that the stipulation just does not tell enough "who, what, when, where and how" for the trial court or this court to make a definitive

[3]During oral argument approximately an hour was spent by the court in colloquy with counsel as to what the stipulation should be. Counsel had diverse but positive notions. The court was in doubt as to the basic facts on the claimed offsets.

ruling. There is enough chance of error if the facts are fully developed.

It would appear that there still is little likelihood of a dispute as to the actual facts and that the matter could be handled on a more comprehensive stipulation. Certainly a stipulation should include and could be entered into as to copies of all the bank records and documents showing how and when the liability of Edmondson to the bank came about. Eventually it may be decided that the contents of the conditional sales contracts, the boat mortgage, and the unsecured note are not too important. But let the court decide that.

The judgment along with the findings and conclusions of the trial court are vacated. The case is remanded for proceedings consistent with the foregoing opinion. See Plastino v. Mills, 9 Cir., 236 F.2d 32.[4]

(Endorsed) Opinion. Filed May 24, 1963.

Frank H. Schmid, Clerk.

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[4]Plastino v. Mills, supra, is a case at the other end of the spectrum. There a simple story was expanded into on overlong and confused discourse which at points was within itself contradictory. But in both cases, Plastino and Bank of America, the stipulation or pre-trial order can be said to be not sufficiently definitive.

Opinion of the United States District Court, for the Southern District of California, Central Division.

United States District Court for the Southern District of California, Central Division.

United States of America, Plaintiff, v. Bank of America National Trust and Savings Association, a national banking association, Defendant. No. 426-61-TC Civil.

Filed May 18, 1964.

This action involves priority of claims to funds in a taxpayer's bank accounts. The United States asserts a lien right; and the defendant bank asserts a statutory right of setoff. There is no dispute as to the facts, both parties having moved for summary judgment.

The taxpayer, J. B. Edmondson, maintained accounts with defendant bank at a branch office in Fullerton, Orange County, California. The accounts stood in the taxpayer's own name and in certain business names. For aught that appears in the record, the businesses were sole proprietorships. The accounts have been treated by the parties as being those of the individual taxpayer, and this Court shall so treat them.

The taxpayer became indebted to the United States for withholding and F.I.C.A. (Social Security) taxes for the first, second and third quarters of 1955. Notices of the various assessments were given, and demands for payment made of the taxpayer, in accordance with applicable provisions of the Internal Revenue Code. Notice of lien for the first assessment was filed in

Orange County, California, October 19, 1955; notices as to the two other assessments were filed in Orange County January 28, 1958.

On August 27, 1959, the district director of Internal Revenue served upon defendant a notice of levy upon all property or rights of property belonging to the taxpayer. By this notice, demand was made of defendant for $12,219.09, this being a portion of the amount defendant then owed the taxpayer. Defendant had no actual knowledge of the existence of the assessments, nor of any United States tax lien against the taxpayer's property, prior to service of this notice.

The district director served final demand upon defendant September 25, 1959. Defendant has refused to pay any of the amount to the Government.

On the date of the notice of levy, the taxpayer's accounts with defendant bank showed total credits of $6,658.31. This figure included amounts credited to Edmondson for deposits during the preceding 30 days of part of the proceeds of various checks drawn on other banks. At the time of such levy, the taxpayer was indebted to the bank in the amount of $11,570.40 upon the following instruments:

> Conditional sale contract, dated March 18, 1958, for purchase of an automobile, which contract was assigned by the seller to defendant March 26, 1958.
>
> Conditional sale contract, dated March 19, 1959, for purchase of an automobile, which contract was assigned by the seller to defendant March 19, 1959.

Conditional sale contract, dated March 20, 1959, for purchase of an automobile, which contract was assigned by the seller to defendant March 20, 1959.

Conditional sale contract, dated September 5, 1958, for purchase of an automobile, which contract was assigned by the seller to defendant September 5, 1958.

Conditional sale contract, dated December 10, 1958, for purchase of an automobile, which contract was assigned by the seller to defendant December 10, 1958.

Promissory note, dated April 21, 1959, payable to the order of defendant, in the amount of $1,200.00, which instrument was payable on demand, or, if no demand were made, on June 19, 1959.

Promissory note, dated May 26, 1959, payable to the order of defendant, in the amount of $1,284.00, secured by a mortgage upon a boat.

With exception of the demand note, each of these instruments contained an acceleration clause providing that in the event of default, all sums unpaid should, at the option of the creditor, immediately become due and owing.

As of the date of the levy, no demand had been made for payment of the demand note, nor had any payment been made thereon. On each of the other instruments there was an installment past due which had not been paid.

The day following the notice of levy, the bank made bookkeeping entries charging the taxpayer's accounts with the sum of $6,658.31 (the entire amount on de-

posit) and crediting this sum against the balances due on the various instruments as follows:

A. On conditional sale contracts for cars:

Car	Balances due 8-27-59	Credit Given for Unearned Portion of Finance Charges	Distribution of $6,658.31	Balances After Entries
1959 Chev.	$1,853.68	$132.33	$1,721.35	ϕ
1959 Ford	2,125.14	52.14	2,073.00	ϕ
1957 Cad.	2,842.02		367.88	$2.474.14
1959 Ford	2,205.12		none	2,205.12
1956 Ford	135.30		135.30	ϕ
	$9,161.25	$184.47	$4,297.53	$4,679.26
B. On boat mortgage:				
	$1,179.14	$ 48.46	$1,130.68	ϕ
C. On unsecured note:				
	$1,230.10		$1,230.10	ϕ
		Total:	$6,658.31	

The Government claims a prior right under Internal Revenue Code §§ 6321, 6322, 6323, 6331 and 6332, governing liens for taxes and enforcement thereof. Defendant relies principally upon California Code of Civil Procedure § 440:

> *"Counterclaim; compensated demands; effect of assignment or death*
>
> "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

The Court views this case as being controlled by the decision in *Bank of Nevada v. United States,* 251 F. 2d 820 (9th Cir. 1957), *cert. denied,* 356 U.S. 938 (1958), notwithstanding that defendant herein relies on a statutory right of setoff under state law, while in the *Bank of Nevada* case reliance was on a "general lien or right of setoff." As the Court pointed out in that case, at p. 824:

> "The Supreme Court has repeatedly and emphatically stated that Federal tax liens and the provisions for their collection are strictly *Federal* and strictly statutory. . . .
>
> * * *
>
> "Section 6332(a) [of the Internal Revenue Code] gives the appellant [bank] only two defenses; namely, (1) that it was not in possession of property of the taxpayer which was subject to levy; or (2) that the property was subject to a prior judicial attachment or execution. The statute admits of no other defenses." (Emphasis in quoted material.)

While this in itself was sufficient to defeat the claim of the defendant in the *Bank of Nevada* case, the court went on to point out the Government's claim arose before any right under the instruments held by the bank. The same is true in the present case.

In the *Bank of Nevada* case, the defendant's claim was based upon a demand note similar to one of the instruments here. The Court of Appeals noted the bank's right of setoff arose only subsequently to and as a result of the tax levy, and hence the bank did not have priority.

Defendant argues with some ingenuity the bank was purchaser of certain checks, part of the proceeds of which were deposited to the taxpayer's various accounts during the 30 days preceding the levy, and consequently the lien is not valid against defendant under Internal Revenue Code § 6323. That section provides that the lien shall not be valid "as against any mortgagee, pledgee, purchaser, or judgment creditor" until notice has been filed.

Here the Government did not seek to levy upon any property purchased by the bank (i.e., the checks) but rather upon the defendant's debt to the taxpayer. Nor did the Government levy upon mortgaged property, although the bank was a mortgagee.

It is inconceivable that, by § 6323, Congress meant to say if a bank or other entity became a purchaser or a mortgagee in one transaction, funds held by it as a result of another transaction (i.e., creation of a debtor-creditor relationship in respect to a bank deposit) would be beyond the reach of the Government in a proceeding such as this.

Nor do we find persuasive the defendant's argument that the taxpayer himself, being indebted to the bank, could not demand payment on his accounts and therefore the Government could not demand such payment. While the bank asserts it had a right of setoff, it had not exercised this right as of August 27, 1959.

Plaintiff shall have judgment against defendant in the amount of $6,658.31, together with interest as provided by law, and costs.

Dated: This 18th day of May, 1964.

Thurmond Clarke
United States District Judge

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Bank of America National Trust and Savings Association, a national banking association, Defendant-Appellant, vs. United States of America, Plaintiff-Appellee. No. 19,469.

[May 13, 1965]

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Pope, Merrill and Browning, Circuit Judges

Per Curiam:

This appeal presents the question whether a Government tax levy[1] upon the taxpayer's checking and savings accounts prevails over an existing indebtedness from the taxpayer to the bank.[2]

Assessment for delinquency against the taxpayer was made by the Director in 1955. Notices of tax lien were recorded in 1955 and January, 1958. Obligations of the taxpayer to the bank arose by virtue of various loans made commencing in March of 1958. The amounts here involved were deposited to the taxpayer's accounts prior to August 27, 1959. Notice of levy was served on the bank on August 27, 1959. At that time the taxpayer was in debt to the bank in the sum of $11,570.49. His

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[1]Under Int.Rev.Code of 1954, §§6331 (Levy and Distraint) and 6332 (Surrender of Property Subject to Levy).

[2]The opinion of this court on a prior appeal is reported at 317 F. 2d 859 (1963). The District Court's opinion on the remand from which this appeal is taken is reported at 229 F.Supp. 906 (S.D.Cal. 1964).

bank accounts then amounted to $6,658.31. The day following the Government levy, by bookkeeping entry, the bank credited the amount in the taxpayer's accounts against the taxpayer's indebtedness to the bank.

The District Court, in holding for the Government, ruled that this case is controlled by our decision in *Bank of Nevada v. United States,* 251 F.2d 820 (9th Cir. 1958), *cert. denied,* 356 U.S. 938 (1958). We agree.

The bank seeks to distinguish this case upon the ground that in *Bank of Nevada, supra,* it was the levy itself which accelerated and rendered mature the obligation of the depositor to the bank, while here the obligation was mature at the time the deposit was made and at all times thereafter. The language and rationale of the *Bank of Nevada* case do not permit of such a distinction, 251 F.2d 820, 827.

Judgment affirmed.